

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS M. GAITAN and TAMIE R.
GAITAN,

UNPUBLISHED
February 2, 2010

Plaintiffs-Appellants,

V

No. 287116
Ottawa Circuit Court
LC No. 07-058024-NO

LAKESHORE HABITAT FOR HUMANITY,
INC.,

Defendant-Appellee.

DOUGLAS M. GAITAN and TAMIE R.
GAITAN,

Plaintiffs-Appellees,

V

No. 288092
Ottawa Circuit Court
LC No. 07-058024-NO

LAKESHORE HABITAT FOR HUMANITY,
INC.,

Defendant-Appellant.

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

In docket no. 287116, plaintiffs Douglas M. Gaitan and Tamie R. Gaitan¹ appeal the trial court's July 23, 2008 opinion and order, which granted defendant Lakeshore Habitat for Humanity, Inc. summary disposition. In docket no. 288092, Lakeshore appeals the trial court's September 24, 2008 order denying costs and attorney fees to Lakeshore as case evaluation

¹ Plaintiff Tamie R. Gaitan is Douglas M. Gaitan's wife. Tamie's claim relates to a loss of love, support, consortium, and companionship with Douglas; therefore, Tamie's claim is derivative of Douglas' claim. Douglas will hereafter be referred to as Gaitan.

sanctions. These cases were consolidated on October 23, 2008. *Gaitan v Lakeshore Habitat for Humanity, Inc*, unpublished order of the Court of Appeals, entered October 23, 2008 (Docket Nos. 287116; 288092). In docket no. 287116, we reverse the trial court's July 23, 2008 opinion and order and remand for further proceedings. In docket no. 288092, we affirm the trial court's September 24, 2008 order, because, as a result of our reversal of the grant of summary disposition, sanctions are premature. .

In this case, Gaitan, who worked for TNT Roofing, Inc. and was at a job site to put a roof on a house that was being constructed by Lakeshore, fell to the ground and injured himself when he was attempting to access a roof via scaffolding. In docket no. 287116, Gaitan argues that the question whether he retained his status as an invitee was a question of fact for the jury to resolve. He, also claims that he did not exceed the scope of his invitation, such that his status would change to that of a trespasser, because he reasonably believed that his invitation extended to the use of the scaffolding. Consequently, Gaitan argues that the trial court erred by finding as a matter of law that he was a trespasser on the scaffolding. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the cause of action. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568. In evaluating a motion for summary disposition brought under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden*, 461 Mich at 121.

The tort of negligence has four elements: 1) a duty; 2) the breach of that duty; 3) proximate cause; and 4) damages. See *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). The "duty" element addresses "whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct." *Id.* Duty is a question of law for the court to decide. *Id.*

It is the relationship of the parties that determines what duties run between them. In this case, defendant is a landowner and plaintiff was a visitor on the landowner's premises. A visitor may be classified as a trespasser, a licensee,² or an invitee. *Campbell v Kovich*, 273 Mich App 227, 235; 731 NW2d 112 (2006).. A person who is on an owners premises for a commercial purpose is usually considered an invitee. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 61; 680 NW2d 50 (2004). "Generally, a premises possessor owes a duty of care to an

² Whether Gaitan was a licensee is not an issue herein.

invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.” *Mann v Shusteric Enterprises, Inc.*, 470 Mich 320, 328-329; 683 NW2d 573 (2004) However, an invitee who exceeds the scope of their invitation can become a trespasser. *Constantineau v DCI Food Equip, Inc.*, 195 Mich App 511, 515; 491 NW2d 262 (1992). A trespasser is a person who enters, remains on, or ventures into parts of, another's land without the owner's consent. *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001); *Constantineau*, 195 Mich App at 514-516. No duty is owed by a landowner to a trespasser except to avoid injuring the trespasser by wilful and wanton misconduct. *Id.*

Plaintff claims he was an invitee while defendant argues that plaintiff relinquished that status and became a trespasser when he exceed the scope of his invitation by venturing onto the scaffolding. “The status of a person on the land of another is ordinarily a question of fact for the jury.” *Shears v Pardonnnet*, 80 Mich App 358, 361; 263 NW2d 373 (1977). In some circumstances the evidence may demonstrate the essence of a person’s status as a matter of law. *Id.* However, if persons of average intelligence can disagree regarding the purpose for a visitor’s presence, his status is a question of fact. *White v Badalamenti*, 200 Mich App 434, 436; 505 NW2d 8 (1993).

We conclude that the trial court incorrectly concluded as a matter of law that Gaitan exceeded his invitation when he used the scaffolding, thereby changing his status from an invitee to that of a trespasser. The parties agree as to several essential facts. They agree that the scaffolding did not belong to TNT, Gaitians’s employer. They also agree that Gaitin brought a ladder to the job site but chose to use the scaffolding instead. Additionally, there is agreement that while the ladder that was initially used to access the scaffolding had been removed, the scaffolding was not taped off and was accessible form the windows at the project site. The testimony establishes that Gaitan did not receive express permission to use the scaffolding, nor was he expressly refused access to the scaffolding.

We find that when viewing the evidence in the light most favorable to the non-moving party, a genuine issue of material fact exists as to whether Gaitan exceeded the scope of his invitation by using the scaffolding. This is not a circumstance like that *Munson v Vane-Stecker Co*, 347 Mich 377; 79 NW2d 855 (1956), where the court found that there was no possible mutual advantage to the landowner and the visitor in the use of certain equipment. Given the absence of either express permission or prohibition, the absence of posting or taping off of the scaffolding, its easy access and the custom of TNT to use only its own equipment, persons could certainly disagree regarding whether Gaitan exceeded the scope of his invitation when he accessed the scaffolding. In declaring that Gaitan was trespassing on the scaffolding, the trial court improperly assumed the role of finder of fact. Therefore, we reverse the lower court’s grant of summary disposition in favor of Lakeshore and remand for further proceedings. We refrain from addressing whether the scaffolding presented an open and obvious danger because the trial court did not reach the merits of that particular argument and because we conclude that the factual record is not adequately developed regarding the nature of the condition at issue.

As a result of determining that summary disposition was improperly granted, it naturally follows that defendant is not entitled to relief in docket no. 288092. Because this case has not proceeded to verdict, sanctions are currently unavailable under MCR 2.403(O). However, Lakeshore is not precluded from pursuing sanctions once a verdict has been reached.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly